

**BEFORE THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**MARY A. LEE**

**APPELLANT**

**V.**

**NO: 2016-WC-00465-COA**

**BON WORTH INC., and**

**APPELLEE**

**TWIN CITY FIRE INSURANCE COMPANY**

**APPELLEE**

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**BRIEF OF APPELLEES**

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**NO: 2016-WC-00465-COA**

**BON WORTH INC., and**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order for the Court of Appeals of the State of Mississippi to evaluate possible disqualification or recusal.

1. Mary A. Lee, Claimant/Appellant;
2. BonWorth Inc., Employer/Appellee;
3. Ned “Tres” McDonald, and the law offices of McDonald Law Firm, PLLC, 143-C Willowbrook Drive, Saltillo, Mississippi 38866, Attorney of record for Claimant - Appellant;
4. The law firm of Markow Walker, P.A., P.O. Box 13669, Jackson, Mississippi 39236, Attorneys of Record for Employer/Carrier-Appellees;
5. Honorable Tammy Green Harthcock, Administrative Law Judge of the Mississippi Workers’ Compensation Commission;
6. Honorable Liles Williams, Honorable Thomas A. Webb, Honorable Beth Harkins Aldridge, Post Office Box 5300, Jackson, Mississippi 39296-5300, Honorable Commissioners of the Mississippi Workers Compensation Commission; and
7. Joyce Wells, Mississippi Workers’ Compensation Commission Secretary

/s/ J. Andrew Faggert

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## STATEMENT OF THE ISSUES

- I. Whether appeal from judgment of the Mississippi Workers' Compensation Commission dated March 9, 2016, denying a Motion to Compel Medical Treatment is interlocutory.
- II. Whether the Mississippi Workers' Compensation's *Order* dated March 9, 2016, is supported by substantial evidence.

## **STATEMENT OF THE CASE**

### **I. Procedural History**

On May 24, 2013, the Claimant suffered an admittedly compensable injury to her left knee. R. at 92. Claimant's treating physician, Dr. Bryan Fagan, recommended a total knee replacement stating same was not causally related to her admitted work accident. Id. Subsequently, the Employer and Carrier denied authorization for surgery based on Dr. Fagan's opinion that stemmed from claimant's diagnosis of avascular necrosis, secondary to a prior left knee arthroscopic surgery. Id.

As a result, the Claimant sought a second opinion from Dr. Stephen Southworth. Id. at 93. Dr. Southworth agreed with Dr. Fagan's recommendation for a total knee replacement. Id. However, Dr. Southworth noted claimant's need for a total knee replacement was not related to her May 24, 2013, work injury. Id. He concluded by placing the Claimant at maximum medical improvement (MMI) effective the same day, unless she received further treatment.

On July 3, 2014, a Commission ordered Independent Medical Examination was performed by Dr. Apurva R. Dalal. Id. Contrary to the opinions of Dr. Fagan, and Dr. Southworth; Dr. Dalal felt the need for a total knee replacement related to the May 24, 2013, work incident. Id.

Claimant filed a *Motion to Compel Medical Treatment* on September 2, 2014. Id. at 30. The Employer and Carrier timely responded to same. Id. at 41. A Hearing on the Claimant's *Motion to Compel Medical Treatment* was held March 12, 2015. Id. at 40.

The Administrative Judge entered an *Order* granting *Claimant's Motion to Compel* on June 8, 2015, finding Claimant established the need for a total knee replacement was related to her May 24, 2013, work accident. Id. at 62. The Employer and Carrier appealed the Administrative Law Judge's decision to the Full Commission, requesting it overturn the *Order* of the Administrative

Judge as being contrary to the credible weight of the evidence, and contrary to the law, in light of the opinion of Claimant's treating physician, Dr. Bryan Fagan, and the opinion of Dr. Stephen Southworth. Id. at 71.

On March 9, 2016, the Full Commission reversed the Administrative Judge's June 8, 2015, decision, and denying Claimant's *Motion to Compel Medical Treatment*. In support of its decision, the Full Commission noted:

“Based on the evidence as a whole, we find the opinions of Dr. Fagan and Dr. Southworth to be the most probative regarding the causal relationship between Claimant's injury and the need for the knee replacement surgery. Dr. Fagan is the Claimant's treating physician and does not relate the Claimant's need for surgery to her work-related injury. Likewise, Dr. Southworth specifically opined that Claimant's need for the left total knee replacement was not related to her work-injury.” Id. at 93.

Claimant filed her *Notice of Appeal* to this Court on March 24, 2016. Id. at 95. Claimant timely filed her *Appellant's Brief* on April 12, 2016. On April 28, 2016, the Employer and Carrier concurrently filed a *Motion to Dismiss Interlocutory Appeal*, and *Motion to Stay Briefing*. As part of this filing, Employer and Carrier hereby renew their *Motion to Dismiss Interlocutory Appeal*, and continue to assert the Full Commission *Order* below was not associated with a monetary sum, or compensation. Therefore, the Full Commission Order was not a final judgment, and this appeal should be dismissed as being interlocutory. This Court entered an *Order* on May 24, 2016, passing judgement on the Employer and Carrier's *Motion to Dismiss Interlocutory Appeal* for consideration with the merits of this appeal, and granting their *Motion to Stay Briefing*.

## II. *Statement of Facts*

### A. Claimant's Testimony

Claimant testified at the Hearing on her *Motion to Compel Medical Treatment*, she had an unrelated arthroscopic surgery, less than two months prior to her work incident, to repair her left medial meniscus in March, 2013. Tr. 6. Claimant went on to state that she returned to work approximately one week following surgery. Id.

On May 24, 2013, claimant went into a stock room and stumbled over an object causing her to fall forward onto the ground, and allegedly re-injure her left knee. After her fall, claimant treated with Dr. Fagan, and Dr. Southworth. Id. at 11. Eventually, Claimant attended an Independent Medical Evaluation performed by Dr. Dalal in July 2014. Id. at 11. Claimant testified on Direct Examination that her treating physician Dr. Fagan initially told her that her need for a total knee replacement following the May 24, 2013, accident was related to the injury she sustained while at work. Id. at 9 - 10. However, Claimant contradicted her testimony on Cross examination stating, "I did not discuss that with him." Id. at 14 (emphasis added). She admitted that she assumed Dr. Fagan believed her need for surgery was related to her May 24, 2013, injury because her initial office visit following her work accident was paid for by the insurance carrier herein. Claimant testified she returned to work with the Employer herein following the unrelated March, 2013, surgery. Id. at 12. She went on to note various difficulties with her home life, and an inability to return to work following the work incident on May 24, 2013. Id.



B. Medical Evidence

Prior to the admitted work incident on March 21, 2013, the Claimant presented to Dr. Fagan complaining of injury to her left knee. She stated she had injured it while attempting to hang a picture over her bed. X-rays showed good alignment, and an MRI scan revealed a horizontal oblique tear of the posterior horn of the medial meniscus. Dr. Fagan recommended a left knee arthroscopy, with a partial medial meniscectomy taking place on March 27, 2013. (See Gen Ex. 5).

At her next follow-up on April 9, 2013, Dr. Fagan noted claimant had fallen since her surgery and he seemed to think she may have aggravated her symptoms. She was having significant pain in her left knee, and on exam had a small effusion present. Her range of motion was slightly limited, and Dr. Fagan injected her left knee and subsequently recommended she attend physical therapy. Id.

On April 30, 2013, Dr. Fagan noted continued pain along the medial aspect of her knee. Dr. Fagan explained there was not much he could do for her though she did have a root tear, which may have been causing her significant pain. **He concluded he would see her again in approximately two months, and if she was no better at that time, she may need to consider a repeat arthroscopy.** Id.

Claimant continued conservative treatment in the form of physical therapy throughout April 2013. On April 30, 2013, the Claimant reported continued pain to Dr. Fagan. In response, Dr. Fagan again noted there were not a great deal of options to treat same. Id.

Claimant reported the admittedly compensable injury herein to Work Link, and an MRI was performed on June 3, 2013, revealing a medial meniscus tear, partial ACL tear, and partial MCL tear in her left knee. Gen Ex. 1. Additionally, there appeared to be an osteochondral fracture along the articular surface of the medial femoral condyle, but in the absence of trauma, osteonecrosis could

have the same appearance. Id. Thereafter, claimant was placed in a knee immobilizer in addition to a left ankle splint and referred to orthopedics. Id.

Claimant returned to Dr. Fagan on June 6, 2013. Dr. Fagan noted claimant's MRI showed significant edema in her medial femoral condyle, and possible osteonecrosis. Post operative surgical changes in her medial meniscus were noted, along with a possible strain of the medial collateral ligament. Dr. Fagan noted it appeared claimant sustained a new injury to her left knee after his last surgery. Specifically:

"this injury at work somewhat clouds this picture. It is difficult to tell if she has this edema secondary to her fall or if this is avascular necrosis after her knee surgery. The meniscus tear is likely post-surgical changes. She may have a strain of her ACL and also strain of her medial ligament which we are going to treat with a hinged brace that she already has at home." R. at 65 (emphasis added).

On January 8, 2014, Dr. Fagan later opined:

"I do not feel that the avascular (sic) necrosis is related to the work injury that Ms. Lee sustained on 5/24/13. She has undergone previous knee arthroscopy and artrial meniscectomy for an injury that she sustained at home. I think the avascular necrosis is likely related to post arthroscopic changes and not the injury that she sustained at work on 5/24/2013." R. 65 (see also Gen Ex. 5).

Dr. Stephen Southworth evaluated the Claimant on November 5, 2013. R. at 66. Dr. Southworth noted the Claimant failed to inform him of the previous surgery during her visit, and only disclosed "advanced arthritis in left knee." Gen Ex. 3. Dr. Southworth's explained his opinion concerning causation as follows:

Question:	Considering Ms. Lee's diagnosis of Osteoarthritis, in your opinion to a reasonable degree of medical certainty, is Ms. Lee's current need for a total knee replacement causally related to her May 24, 2013, work injury?
Response:	No.

General Ex. 3 (see also R. 66).

Claimant was evaluated by Dr. Apurva Dalal on July 3, 2014, for a Commission ordered Independent Medical Evaluation. R. 66. Dr. Dalal reviewed claimant's medical records, and conducted one physical examination of the Claimant. Id. Ultimately, Dr. Dalal disagreed with the opinions of both, Dr. Fagan, and Dr Southworth concerning causation, but he agreed the Claimant needed a total knee replacement. Id. He wrote the Claimant "sustained bone loss in the medial femoral condyle following" the May 2013, work accident. Id. at 67. Dr. Dalal further explained, in his opinion, this was a new finding after the Claimant's second fall. Gen Ex. 4.

## **SUMMARY OF THE ARGUMENT**

First, it is well established an interlocutory order from the Mississippi Workers' Compensation Commission is not appealable. This Court lacks jurisdiction to hear this appeal as it stems from a Full Commission *Order* denying Claimant's *Motion to Compel Medical Treatment*. A final, appealable, judgment is one that adjudicates the merits of a controversy settling all issues as to all the parties, and requires no further action by the lower court. This Court has a duty to analyze its jurisdiction to entertain this appeal.

The Full Commission addressed the lack of causal relationship between Claimant's need for a total knee replacement, and her May 24, 2013, admitted work injury. Similarly, the Administrative Judge only addressed causation in her *Order*. The existence and extent of permanent disability remain un-adjudicated before the Commission. There has been no award associated with a monetary sum, or compensation. Therefore, the Full Commission *Order* is not a final decision. This Court should dismiss this appeal for lack of jurisdiction, and remand same to the Commission for final disposition of the claim.

Alternatively, this Court should find the Full Commission's reversal of the Administrative Judge is supported by substantial evidence. As the trier of fact, the Commission is entitled to a deferential standard of review. The medical evidence, and testimony were carefully weighed by the Commissioners, and their *Order* specifically addressed findings of fact in support of reversal. The Full Commission's holding cannot be characterized as arbitrary, or capricious, therefore this Court should affirm the Full Commission *Order*, and dismiss this appeal.

## **STANDARD OF REVIEW**

“The Full Mississippi Workers' Compensation Commission (Commission) acts as the ultimate finder of fact, and as such its findings are subject to normal, deferential standards upon review. We are to presume that the Commission made proper determinations as to which evidence was credible, had weight, and which was not. Findings of fact made by the full Commission are binding on this Court provided they are supported by substantial evidence. We will only reverse the Commission's decision when the decision is erroneous and contrary to the weight of the evidence. Under the substantial evidence rule, we are further bound from rendering a different decision than that reached by the full Commission even though the evidence presented may lead us to conclude otherwise had we been sitting as the ultimate finder of fact.” *Fin. Inst. Ins. Serv. v. Hoy*, 770 So. 2d 994, 997 (Miss. App. 2000) (citations omitted). “Substantial evidence, though not easily defined, means something more than a ‘mere scintilla’ of evidence, and that it does not rise to the level of ‘a preponderance of the evidence.’ It may be said that it means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.” *Greenville Mfg. v. Mason*, 1998 Miss. App. LEXIS 660, \*7-8 (Miss. Ct. App. Aug. 18, 1998) (emphasis added). “This Court will affirm the Commission's findings of fact if they are supported by substantial evidence. In other words, a Court will reverse an Order of the [Commission] only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence.” *Univ. of Miss. Med. Ctr. v. Rainey*, 926 So. 2d 938, 939 (Miss. Ct. App. 2006) (citations omitted).

## ARGUMENT

### I. This Court Lacks Jurisdiction To Hear This Appeal Because The Full Commission's Order Was Not A Final Award.

This Court has stated "[a]n order is interlocutory when 'the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action.'" *Bullock v. AIU Ins. Co.*, 995 So. 2d 717, 723 (Miss. 2008) (see also: *Blankenship v. Delta Pride Catfish*, 676 So. 2d 914, 917 (Miss. 1996) (quoting *Freeman Truck Line, Inc. v. Merchants Truck Line, Inc.*, 604 So. 2d 223, 224 (Miss. 1992))). "The term "award" is not defined under Mississippi's workers' compensation law, Miss. Code Ann. § 71-3-3 (Rev. 2000), but is used throughout this section of the Mississippi Code. See Miss. Code Ann. §§ 71-3-17(c)(24), (26); 71-3-37(1), (5), (6), (9); 71-3-38; 71-3-49(1), (2); 71-3-51; 71-3-53; 71-3-63; 71-3-67(4); 71-3-75(2); 71-3-89 (Rev. 2000). Throughout this section, "award" is associated with the grant of a monetary sum." *Id.* at 721.

"A final, appealable, judgment is one that adjudicates the merits of the controversy which settles all issues as to all the parties and requires no further action by the lower court." *Harper v. Land O' Lakes, Inc.*, 165 So. 3d 553, 555 (Miss. App. 2015) (emphasis added).

An award is "a final decision to grant or deny a specific amount of compensation. Thus, under Section 71-3-47, it is a decision making or denying compensation, not a determination of liability or entitlement alone, which constitutes an "award." *Id.* at 722.

In this case, the Administrative Judge only addressed whether the Claimant's need for a total left knee replacement was causally related to her admittedly compensable May 24, 2013, work incident. The Full Commission reversed her *Order*. While not specifically addressed, the Full Commission's *Order* impliedly and procedurally remanded the claim for further determination as to

maximum medical improvement, along with the existence, and extent of permanent disability. There was no award granted which can be characterized as being associated with a monetary sum, or compensation. Therefore, the Full Commission Order cannot be a final order.

Claimant would argue because the Full Commission's Order effectively "killed" Mrs. Lee's workers compensation claim. This is simply inaccurate. Procedurally, the Claimant is entitled to a finding as to maximum medical improvement, medical impairment, and permanent disability resulting from her injury. Said differently, the Claimant is entitled to a final order, or award, rendered by the Commission. If Claimant remains unsatisfied with the outcome, she may appeal to this Court's wisdom.

II. Alternatively, this Court Should Affirm The Full Commission Order As Being Supported By Substantial Evidence.

In order to be eligible for benefits in a workers' compensation claim, the claimant must be disabled as a result of a work related accident. Under Mississippi Code Annotated § 71-3-31, "disability" is defined as the "incapacity **because of injury** to earn the wages which the employee was receiving at the time of injury in the **same or other employment**, which incapacity and the extent thereof **must be supported by medical findings**." (Emphasis added). The burden is on the claimant to prove a causal relationship between his alleged disability and his work injury. *Penrod Drilling Co. v. Etheridge*, 487 So.2d 1330 (Miss. 1986).

Claimant failed to meet her burden of proving a causal relationship between her current need for a total knee replacement, and the admitted work accident of May 24, 2013. In her *Order*, at page 7, the Administrative Judge discussed her decision and the basis for same. She discussed Dr. Fagan's records and findings during claimant's unrelated surgery, versus the findings of the post accident

MRI. She emphasized the interpreting radiologist's opinion that claimant's injuries could be characterized as osteonecrosis in the absence of trauma. This comparison is misleading as it takes Dr. Fagan's opinion, and attempts to discredit it with the opinion of another doctor who simply read claimant's MRI results. Certainly, this cannot be said to outweigh the opinion of a treating physician.

Further, the Administrative Judge noted, "Dr. Fagan specifically stated that he did not know if the problems she had in June 2013, were related to her prior surgery or was avascular necrosis." This is simply inaccurate. Dr. Fagan's response to a letter requesting his opinion to a reasonable degree of medical certainty, dated January 8, 2014, specifically notes the claimant's diagnosis of avascular necrosis was not related to the work injury of May 24, 2014. Rather, he noted, "I think the necrosis is related to post surgical change." See Gen Ex. 5.

The Administrative Judge disregarded the opinion of Dr. Southworth noting he failed to review the claimant's medical records. However, the Employer and Carrier are unable to find any evidence in support of this contention. Therefore, this was an erroneous finding disregarded by the Full Commission as finder of fact.

The remainder of the Administrative Judge's findings rested in large part on the opinion of Dr. Dalal. Claimant's treating physician, **Dr. Fagan, treated the Claimant in some capacity from 2011, through 2014.** Surely, his opinion should be given greater weight than a one time evaluation. He performed surgery on the Claimant, and has examined her knee on several occasions, giving him a unique insight into the effect of claimant's May 2013, work injury. Dr. Fagan's opinion is supported by that of Dr. Southworth. When asked to a reasonable degree of medical certainty whether Claimant's need for a total knee replacement was causally related to the work injury, Dr. Southworth responded very clearly, and very definitively "no."



In her *Order*, the Administrative Judge pointed to the claimant's "credible testimony" regarding her return to work with no problems after surgery. She went on to state this was corroborated by the medical records of Dr. Fagan. A review of Dr. Fagan's office notes proves this contention is not entirely accurate. On April 30, 2013, the Claimant reported continued significant pain in the medial aspect of her knee. Dr. Fagan explained there was not much more to offer, and encouraged her to continue therapy. Further, he discussed the possibility of a repeat arthroscopy. Clearly, the Claimant was having continued problems before her work accident, so much so, that a repeat surgery was being discussed less than one month prior to the claimant's fall.

The Full Commission, on review, weighed all the medical evidence as well as the claimant's testimony, and concluded that the need for a total knee replacement was not causally related to the claimant's work injury of May 24, 2013. Clearly, the Order of the Full Commission is supported by substantial evidence, and this Court is bound to uphold that Order.

## CONCLUSION

The Appellees respectfully request this Court dismiss this appeal for lack of jurisdiction as no final order from the Full Commission was entered to appeal from. Alternatively, the Appellees would argue evidence contained within the Record reveals substantial evidence in support of the Full Commission's reversal of the Administrative Judge's *Order* finding the claimant's need for a total knee replacement is related to the injury of May 24, 2013. To the contrary, the overwhelming evidence reveals the Claimant's need for a total knee replacement does not have any causal connection to her admitted work incident. This is supported by the opinion of Claimant's treating physician Dr. Fagan, and the opinion to a reasonable degree of medical certainty of Dr. Southworth. Surely, these two expert opinions taken together, outweigh the opinion garnered from a one time examination by Dr. Dalal.

For these reasons, the Appellees respectfully request this Court find the claimant failed to sustain her burden in proving a causal connection between her need for surgery, and the admitted injury, and affirm the Full Commission *Order* below.

RESPECTFULLY SUBMITTED THIS THE 27<sup>th</sup> day of July, 2016.

BON WORTH INC.,AND  
TWIN CITY FIRE INSURANCE COMPANY

BY: /s/ J. Andrew Faggert  
AMY LEE TOPIK  
J. ANDREW FAGGERT

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the **Brief of Appellees** to:

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*Honorable Commissioners of the  
Mississippi Workers Compensation Commission*

THIS the 27<sup>th</sup> day of June, 2016.

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